Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

M.H. and J.H. on behalf of their child, L.H.,

Petitioners,

vs.

MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard employed by the Court of Appeals for the Second Circuit is inconsistent with the IDEA and accords too much deference to a state process which inherently favors state interests over those of classified children and their families?

2. Whether the highly deferential standard of review employed by the Court of Appeals for the Second Circuit is inconsistent with the standard employed by other Circuit, creating a significant conflict which this Court should resolve?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	
PRIOR PROCEEDINGS	1
STATEMENT OF FACTS	2
REASONS FOR GRANTING CERTIORARI	
A. THE DECISION OF THE COURT OF APPEALS GIVES UNDUE DEFERENCE TO STATE ADMINISTRATIVE DETERMINATIONS	18
B. THE SECOND CIRCUIT'S DECISION IN THIS CASE AND OTHERS EMPLOYS A STANDARD OR REVIEW INCONSISTENT WITH THOSE EMPLOYED BY OTHER COURTS OF APPEALS	22
CONCLUSION	25

APPENDIX

Order of the United States Court of Appeals for the Second Circuit, Filed October 7, 2008 ..... A-1

Memorandum and Order of the United States District Court for the Southern District of New York, Dated March 13, 2007 ..... A-9

TABLE OF AUTHORITIES

Page(s)

Cases

Bachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir.) cert. denied, 488 U.S. 925, 109 S.Ct. 308, L.Ed.1d 327 (1988) 24

Board of Education v. Rowley, 458 U.S. 176 (1982) 19n.18, 20, 21, 22

Burlington v. Dept of Educ., 736 F.2d 733 (1st Cir. 1984), aff'd 471 U.S. 359, 85 L.Ed.2d 385, 105 S.Ct. 1996 22

Carlisle Area Sc. v. Scott P. by & through Bess P., 62 F.3d 520 (3d Cir. 1995) 23

Cerra v. Pawling, 427 F.2d 186 (2d Cir. 2005) 23

CP v. Leon County School Board, 483 F.3d 1151 (11th Cir. 2007) 24

Doe v. Alabama State Dep't. of Ed., 915 F.2d 651 (11th Cir. 1990) 24

Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991) 23

Gregory K. v. Longview School District, 811 F.2d 1307 (9th Cir. 1987) 24

Grim v. Rhinebeck Unified School District, 346 F.3d 377 (2d Cir. 2003) 20

Heather S. v. Wis., 125 F.3d 1045 (7th Cir. 1997) 24

Karl v. Board of Education, 736 F.2d 873 (2d Cir. 1984) 21, 23

Kerkam v. McKenzie, 862 F.2d 884 (D.C.Cir. 1988) 23

M.S. v. Board of Education of the Yonkers City School District, 231 F.3d 96 (2d Cir. 2000) 20

Mrs. B. v. Milford Board of Education, 103 F.3d 1114 (2d Cir. 1997) 23

Muller v. Committee on Special Education, 145 F.3rd 95 (2d Cir. 1998) 23

Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993) 23

School District of Wis. Dells v. Z.S., 295 F.3d 671 (7th Cir. 2002) 24

Sherman v. Mamaroneck Unified School District, 340 F.3d 87 (2d Cir. 2003) 20

Teague Independent School District v. Todd L., 999 F.2d 127 (5th Cir. 1993) 24

Walczak v. Florida Union Free School District, 142 F.3d 119 (2d Cir. 1998) 20

Statutes

20 U.S.C. sec. 1400 *et seq.* 1

20 U.S.C. sec. 1415(i)(2)(c) 18

20 U.S.C. sec. 1415(j)(3) 18

28 U.S.C. sec. 1254(1) 1

Other Authorities

121 Cong. Rec. 37416 (1975) 20

OPINIONS BELOW

The district court's opinion granting petitioners' motion for summary judgment and ordering tuition reimbursement and attorneys fees and costs was filed on March 13, 2007 and is unreported. The Court of Appeals decision reversing the district court's decision was rendered on October 7, 2008 and is reported at 2008 U.S. App. LEXIS 21299. The mandate was issued on November 3, 2008 and filed in the district court on November 5, 2008.

JURISDICTION

This Honorable Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. sec. 1254(1) as the order of the Court of Appeals was entered as a mandate on November 3, 2008 and is final.

STATUTORY PROVISION INVOLVED

The proper interpretation of the judicial review provisions of the Individuals with Disabilities in Education Act ["IDEA"], 20 U.S.C. sec. 1400 *et seq.* is raised by this Petition.

STATEMENT OF THE CASE

PRIOR PROCEEDINGS

An Impartial Hearing Officer, an attorney, determined that **both** the Summit and the Family Foundation Schools were **appropriate** placements for L.H., a classified teenager. On this basis, he denied the parents' request for tuition reimbursement.

The State Review Officer, also an attorney, affirmed the finding of the Impartial Hearing Officer and concluded that L.H.'s needs were appropriately

met by a day program at the Summit School, a location about 40 miles from her parents' residence in Monroe, New York.

The district court overturned both findings and held that the child's needs could not be met at a day program because she was incorrigible and out of control and such a program would not provide her the structure needed to address or meet educational needs. Accordingly, it granted petitioners' motion for summary judgment and denied respondents' and entered judgment in favor of petitioners.

The United States Court of Appeals for the Second Circuit reversed, giving substantial deference to the state administrative determinations and holding that during her short stay at the Summit School, L.H. had progressed sufficiently to support the appropriateness of that placement for her.

STATEMENT OF FACTS

At the time of the impartial hearing, L.H. was a 17 year old female, the youngest of five children. [Tr. 31]. Long been classified as learning disabled, she had received special education services from defendant school district. See, JXs-4 [IEP from June 6, 1998, when student was first classified], 5, 6, 7, 8, 9, 10, 11 & 13. In 6th grade, L's parents started taking her for private counseling, [Tr. 108-09], which was not particularly effective as L was "a tough kid, just wouldn't listen, [was] fighting with her brothers and sisters and not doing well in school, not doing her homework or getting into trouble." [Tr. 110]. At aged 13, L started sneaking out of her house and having oral sex with unidentified men. [Tr. 111].

In mid-January 2005, L sister found lewd pictures of L on her camera. [Tr. 34-35, 37]. The photos depicted her having oral sex with a male. **See**, JX-19, Screening/Admission Note. When L father tried to speak with her about the pictures, she bit him several times and went into a tantrum. [Tr. 35].

Several weeks before these events, L told her parents that she had attempted suicide around New Year's Eve 2005. [Tr. 37].

On or about January 14, 2005, the Hs went to school in the early afternoon to get L who had, by then, complained to school authorities and then to Child Protective Services, that her father and brother had physically assaulted her the prior evening. [Tr. 42-44]. After speaking with CPS for about four hours, the Hs were cleared of any wrongdoing and took L to Arden Hill Hospital for a psychiatric evaluation. [Tr. 40, 46-47].

Arden Hill found that L needed services, but did not have a placement for her. She was transported that evening to Four Winds, a mental hospital in Westchester County, where she remained for three weeks. **See**, JX-19, Tr. 46.

While L was at Four Winds and after the Hs reported his conduct to law enforcement authorities, L's "boy friend", a lieutenant in the New York City Police Department, committed suicide. **See**, JX-19, Tr. 48-49.

On January 18, 2005, shortly after L's admission, a certified social worker at Four Winds wrote that she had poor judgment, no insight and extremely poor relations with her family and peers. **See**, JX-19

Four winds diagnosed L with serious depressive conditions and its staff recommended that she attend a "therapeutic school." **See**, JX-19, p. 3.

In a "clinical recommendation" dated February 23, 2005 - at discharge - Four Winds staff supported L's placement in a "supportive program that offers a low student-teacher ratio, a **highly structured environment** and therapeutic support..." **See**, JX-22 [emphasis added].

After release from the in-patient program at Four Winds, for several weeks, L attended its Partial Hospitalization program and lived at home. [Tr. 147-48]. During this period, she remained non-compliant with family rules. [Tr. 50-51].

Shortly after L was discharged from Four Winds, on February 28, 2005, the school district's CSE agreed that a psychiatric evaluation was necessary and that, pending its completion, L should be evaluated for placement at an Intensive Day Treatment [IDT] program run by BOCES at a high school in Orange County. **See**, JX-14.

In March 2005, on referral from the CSE, Dr. Richard A. Hahn, a psychiatrist, concluded that L was suffering from bi-polar spectrum and oppositional defiant disorder, **See**, JX-19, Tr. 225. Dr. Hahn was non-definitive on placement, suggesting that a program "provid[e] increased structure and routine throughout her day (such as a modified school day at her high school) and eventually offer[ing] a vocational training component to her program for her 12th grade year. Should this not be sufficient at maintaining her functioning, then

it is likely that L will require a more structured small class program with counseling supports." See, JX-23.[1]

The parties initially agreed to L's temporary placement at Four Winds Partial Hospitalization Program and IDT. [Tr. 209]. On March 21, 2005, the CSE recommended that the Hs consider the Summit School, among three others, where she would allegedly receive "a highly structured therapeutic high school program" in a small setting. See, JX-15.[2]

The need for this placement was not occasioned by L failure to perform academically. Indeed, during the entire 04-05 school year, L's academic success was not in question. See, JX-14, Minutes from 2/28/05 IEP meeting which show that student was academically productive and on track to fulfill requirements for graduation despite substantial emotional crises and JX-15 which shows that L met academic goals while enrolled at IDT.

L attended the IDT program for two weeks, but refused to attend the third week and started to display negativity and non-compliance. [Tr. 52].

On April 13, 2005, at the next CSE meeting, the parties agreed to place L at the Summit School, where she completed the 2004-05 school year. See, JX-16. The Hs agreed to this placement because it was the best program from amongst those suggested by grievant. [Tr. 54].

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[1] The IEP informed by the Hahn report does not mention vocational training. Tr. 235-36.

[2] The IDT placement was not a "therapeutic school". [Tr. 210].

Summit is a state-approved 9-12 school for classified students. [Tr. 287-88]. 115 of its 140 students are residential placements. **See**, JX-30, Tr. 175, 264. L attended Summit as a day student and, the parties had no discussion of the possibility that she might attend that school as a residential student. [Tr. 331].

Summit's day program serves many types of "troubled children." See, JX-30. It addresses the needs of students that are emotionally fragile, that have been diagnosed with major depression and mood disorders, that suffer from Asperger's Syndrome, Tourette's Syndrome and/or Attention Deficit Disorder. *Id.* at 179, 290. However, Summit does not offer a "behavioral program" or provide one-on-one supervision for students 100% of the school day. [Tr. 299]. Instead, it features an open campus which is "not physically restrictive." Therefore, it "cannot consider for admission those applicants who have demonstrated behaviors that require restriction for safety's sake." See, JX-30, Tr. 261.

All teachers at Summit are certified in special education and some are also certified in subject matters. [Tr. 290]. It employs one school psychologist who does academic and educational testing at the school three days/week, [Tr. 291] and eight certified social workers, three of whom work exclusively with day students. [Tr. 292].

L was at Summit for six or seven weeks and her stay was mixed. **See**, JX-24 & 26 for disparate teacher reports written a few weeks after L came to

the school.[3] Initially, at Summit L was ill-behaved and suffered from adjustment disorder. [Tr. 115, 181]. She reverted to prior flirtatious ways, cut school and, took advantage of the "open campus" by walking into downtown Nyack. [Tr. 56-57, 181].[4]

After four days, Summit's principal called J.H. and reported that contrary to prior agreement with him, L had told other students about her sexual relationship with the New York City police officer. [Tr. 115]. He also reported that L had brought firecrackers into the school, was flirting with a teacher and had cut school with a male student. [Tr. 115].

After L had been at Summit for two or three weeks, at a meeting he initiated with plaintiffs, Sitman reported that L "was on the campus but was not going into class." [Tr. 304-05, 350].[5] Instead, L was spending a great deal of time with a male residential student. *Id.* Staff had to bring L to class and she was "somewhat disruptive." [Tr. 305].

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[3] In these reports, several of her teachers mention that L.H. needs to focus on the class, not be so engaged in "social" issues. Other teachers warmly compliment her. See, JX-26.

[4] Ricker did not know the number of classes L. cut. Tr. 242.

[5] Sitman had no record of how many classes L. missed or cut while at Summit. Tr. 344.

After this meeting with the Hs, the principal reported that L's behavior improved and she did fairly well her last several weeks in program. [Tr. 306].[6]

While L was at Summit, her mother found writings by her daughter which identified a male student she had met at Summit as her boyfriend. [Tr. 116-17].[7] This concerned plaintiffs who felt L was boy crazy and wanted her to focus on her school work and graduate, not involve herself with boys. [Tr. 119].

The LCSW with whom L worked while at Summit wrote, "L presents as a hyperactive and hypomanic and sees little or no optimism in a future especially one with independence."[8] According to this staff member, L "has slowly acclimated to the program." See, JX-25.[9]

Summit did not provide parent education and support or any medication management for L, a day student. [Tr. 186, 352]. Its principal observed no

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[6] Mr. H. denied receiving a call from Sitman or being at a meeting with the principal three weeks or so after L. was enrolled at Summit. Tr. 375-76. JH also denied any such meeting. Tr. 379.

[7] This concerned the Hs because at their initial meeting with Sitman, they advised of L.H.'s proclivities to be boy crazy and indicated that they did not want her to be involved with boys while at Summit.

[8] A hypomanic presents with an agitated state, requires less sleep [than others] and is typically grandiose in her thinking. Tr. 245.

[9] The author of this report did not testify at the impartial hearing.

grieving on L's part and Summit provided no grief counseling for her. [Tr. 357].

Despite its claim to provide "significant support services aimed at modification of both their academic deficits and their emotional issues," **See**, JX-30, Summit provided L minimal services beyond her academic classes.[10]

While Summit provided individual counseling twice a week, L told her parents this was a waste of time and regularly failed to attend at least one session weekly. [Tr. 62, 129, 333-34].[11] Again, contrary to Summit's representations, the school provided no group therapy program for L. **Id.**, Tr. 232, 336.[12] Likewise, despite its recognition that dealing with child/parent issues can be critical for students like those at Summit, the school provided no vehicle for involvement by the Hs. [Tr. 337-38]. Summit made no effort to involve L's parents in any form of family therapy and provided minimal therapy for L. *Id.*

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[10] For instance, there is no evidence that while attending Summit [or before being admitted], L was seen by a psychiatrist or psychologist related to that school.

[11] According to J.H., nobody from Summit advised her that her daughter was not attending the counseling provided in her IEP. [Tr. 129].

[12] While Dr. Hahn recommended group counseling and the IEP required it, Summit never implemented it. Tr. 232-34.

Contrary to the 2005-06 IEP, JX-16, the defendant's social worker did not "contact [L's] parents to offer assistance with arranging a network meeting." [Tr. 122-23]. According to the IEP, the purpose of this contemplated networking was to "avoid a placement out of the home." [Tr. 123].

In June 2005, L failed Math B [55] and US History and Government [54] Regents and scored a 62 on the English exam. **See**, JX-26, p. 3 & JX-27.[13] To plaintiffs, these failures called into question the grades L received in Math [A] and English [C] classes at the Summit School. **Id.** at 4.

Petitioners grew concerned that Summit offered insufficient supervision and structure for L. While attending Summit, L was no more obedient or responsive at home. The Hs also had to constantly supervise L, take her everywhere they went "like a two year old". They also observed her fighting with her siblings. [Tr. 57, 138-40, 162].

In June 2005, petitioners concluded that L was continuing her erratic behavior and needed greater structure if she was to progress.

Concerned that L needed greater structure, direction and attention, the Hs visited the FFS before the June 15, 2005 CSE meeting. At that CSE meeting, the Hs provided the district notice of their intent to place their daughter as a residential student at FFS, which is located in Hancock, New York. **See**, JX-18, Tr. 120. As the minutes to that meeting show, "[T]he parents indicate[d] that the student has been defiant and difficult to manage at

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[13] FFS does not administer the Regents in August and expects L.H. to take the Regents she failed in January 2006. [Tr. 199].

home. Parent's attorney stated that parents want the district to place student at the Family Foundation School on a residential basis." **Id.**

FFS is a college preparatory, private boarding school for about 250 classified and non-classified students ages 12-19. [Tr. 385, 508]. About 2/3 of the students at FFS are unclassified. [Tr. 512]. FFS specializes in working with students with behavioral or emotional problems. [Tr. 508]. FFS has a detailed admissions process which adjudges the appropriateness of each interested student and exposes their families to essential elements of FFS' program before accepting the student. [Tr. 508-510]. Most of the students enroll at FFS with problems of disobedience to rules, poor grades or academic failure. Many have emotional problems and have engaged in considerable acting-out and anti-social behaviors. [Tr. 389]. FFS does not accept non-verbal learners or students with "severe psychiatric disorders". [Tr. 511].

FFS employs a highly therapeutic approach 24/7 - there are always adults for needy residents to speak with as well as similarly-situated peers. [Tr. 528]. FFS offers a family-styled living arrangement for all students.[14] The school divides its students into

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[14] Interestingly, Summit has many of the same features as FFS, but these were not part of LH's program there. For instance, "group living is an essential part of the Summit program. The twenty-four hour living experience is designed to provide opportunities for constructive interaction and development as the child reexamines maladaptive patterns of relationships and responses.... The child care and recreation staff supervise and work with the children at all times outside of school hours, providing feedback to the students about each aspect of their everyday activities. These interactions take place in the context

eight families with a mother and father figure in each. [Tr. 384]. Each "family" has one family counselor and one student counselor assigned to it. [Tr. 417].

Each student, including L.H., resides in a dorm with about 30 other students. About 15 staff are assigned to each house. [Tr. 388]. These houses are evenly divided between boys and girls. Tr. 386. All FFS staff belong to one of the eight families. Tr. 387. Susan Runge, FFS' Director of Counseling for the last 13 years, explained the rationale for the "families": "when the student comes in, they are feeling confused, lost and, usually, very angry. They are brought into a family and made to feel welcome, and we eat meals together, and do our homework at night together. We try to make it as much a home atmosphere at possible. They have a living room, they have a dining room. Each family does and we do their homework together, watch movies there together..." [Tr. 388, 514-15].

This group experience was absolutely necessary for L and addressed her essential emotional need by fostering her learning to live with other people and relate to them. "She is learning to communicate effectively. She is learning how to have friends..." [Tr. 516].[15]

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of the scheduled recreation program as well as through individual and group discussions." **See**, JX-30.

[15] Gotthardt expressed this opinion; she has spent time with L.H. almost every day, often in one-on-one conversations. [Tr. 517].

At FFS, every student has a student sponsor, Pat Brown in L's case, [Tr. 132], who maintains regular contact with both the student and her family. *Id.*[16]

Staff and students eat meals together, engage in a constant dialogue about responsible conduct and provide support and feedback to each other. [Tr. 62-63, JX-29, p. 27].

During the first parental visit to the school [pre-admission], parents attend lunch to gain an understanding of the methods used at FFS. Tr. 391. Parents also fill out a very lengthy questionnaire and speak with senior staff so as to insure their child is a good fit for FFS. [Tr. 393].

From the outset, FFS staff believed its program well matched L's needs; as she has remained at the school, "the more we [staff] are finding that the program is working for her. It is a right fit." [Tr. 587]. The intense level of positive and structured interaction meets L's needs because "she can't be trusted on her own. If she says she is going to do something, she does totally the opposite." [Tr. 122]. Referring to FFS, J.H. explained, "That school there ... she is just being monitored all the time." [Tr. 128].

L needs the 24/7 support FFS provides *lest she regress.* Renee Gotthardt, a certified social worker [Tr. 508], is L's group and family counselor and a member of her family unit. [Tr. 512]. She explained, "her history shows when she has had less than 24/7 support, she has been able to act out and get caught

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[16] This again contrasted with Summit, which provided little feedback to the Hs concerning their daughter's progress. [Tr. 132-33].

back in sort this never ending loop ... of being okay, then acting out, being okay, then acting out, then being okay and acting out, it goes without end." [Tr. 529].

L's days are highly structured and include academic, athletic, spiritual and emotionally challenging experiences. Usually students are up at 6:15 a.m., clean their rooms, attend chapel with varying religious leaders, eat breakfast with their families, participate in clean-up and then attend classes or group counseling between 8 am and 5 or 6 pm. [Tr. 396-97, 511]. Students then are engaged in other activities, like sports, music, art, drama, wood carving. [Tr. 397]. Thereafter, students gather, sing grace and eat dinner as families. [Tr. 400]. After dinner and clean up, students have study hall time, group therapy sessions or attend tailored groups like Emotions Anonymous. [Tr. 400-01]. Thereafter, some evenings, students accompany their families to the chapel for quiet meditation while on others, the students have quiet time with their families in the residential quarters. [Tr. 401].

Through the school day and evening, the level of supervision is "constant". Students "are never alone." [Tr. 402, 515-16, 541]. This is true until residents earn greater trust and independence. *Id.*

Gotthardt explained that an unstructured program could not meet L's needs as it did not provide enough discipline. "She is a girl who needs some limits set. I think there is too much potential for relapse in acting out in that situation[.]" referring to a day program like Summit. [Tr. 529-30].

Gotthardt leads weekly, eighty minute group counseling sessions with L.H. and between 6-10 other students. [Tr. 409, 513]. L has consistently attended the group counseling sessions at FFS and is an active participant. [Tr. 521]. At these sessions, residents deal with set topics and have time to raise their immediate issues before the group. [Tr. 520-21]. Group counseling is critical for L because she has consistently engaged in anti-social behavior, ignoring the consequences of her actions toward her peers. Counseling brings her together with peers who are struggling to overcome similar issues. [Tr. 521].

Apart from group counseling, Gotthardt also regularly provides one-on-one counseling for L on an as needed basis. [Tr. 522]. L has taken advantage of such unscheduled individual counseling with one of her group leaders on an as-needed basis. [Tr. 411-12, 522].

FFS is chartered by the New York State Department of Education and accredited by Middle States Association. [Tr. 406, 593-94]. It is a Regents-oriented program. [Tr. 591]. All the students are on Regents track. [Tr. 591]. Students are graded monthly, though the school has two semesters, from July to December and January through June. [Tr. 592]. The average class size for academic subjects at FFS varies between nine and fifteen students. [Tr. 398, 592-93]. Teachers at FFS need not be licensed in subject matter or education. [Tr. 406, 597-98]. 95% of the teachers have four year degrees., but, more critical to FFS administrators is that all teachers are "willing and able to work with a high risk child," many of whom have "low self esteem." [Tr. 407]. Most of the faculty at FFS are long-time members of the school community. [Tr. 408].

In July 2005, upon her arrival at FFS, L was assigned to re-take certain 11th grade courses **See**, JX-28, p. 12, Tr. 594-95 because she had failed the Regents in three subjects and FFS staff concluded that re-enrolling her in the relevant classes was the best strategy to help her pass her exams.

FFS students, including L, participate in inter-scholastic athletics against public and parochial high schools. [Tr. 398-99].

Apart from its academic and counseling programs, FFS features a structured approach aimed at fostering family re-unification, which is a critical need for L. [Tr. 514-15][L has tremendous need to learn to love with other people and relate to them without always pushing people away so she can be the center of attention].

When she arrived at FFS, L was profoundly hostile toward her parents, expressing a desire to hurt them. **See**, JX-28, notes dated July 22, 2005 by Dr. Ivan Fras. Her hostility, very low self-esteem, flirtatious proclivities and denial of problems posed obstacles to L's growth and maturation. *Id.*

As in all cases, FFS enforced an initial period of separation or a "cooling off" period between L. and her family. [Tr. 427-28][period of de-escalation needed between warring family members]; [Tr. 531-32][cooling off period because by the time a student is enrolled at FFS, the family has been through an awful lot and needs time to back away from conflict and reflect].

In August, the Hs came to the school for an "initial seminar weekend" with other similarly-situated parents. [Tr. 150, 424]. Runge explained: "we talk,

we orient them to what we are doing here and we get them working together as parents, so when they leave here they have a little support system. We hook them up with groups, outside 12 step groups or tough love or Families Anonymous ... So we try to get them going in the right direction and answer all their questions." [Tr. 424-25].[17]

Trying to improve family relations is a critical part of the FFS program since many of the students have highly destructive and disharmonious primary relationships which severely impact their functioning and ability to trust others and form new relationships. [Tr. 429].

Correlatively, dealing with these primary relationships allows residents to be more open and honest with others, to make friends more easily and to be self-accountable. [Tr. 535-36]. Getting residents to confront and overcome their feelings of anger, low self-esteem and fear is a 24/7 enterprise at FFS and space is provided during all activities for the emoting needed to assist residents express such feelings. [Tr. 429-30]. Gotthardt leads required parent counseling sessions which are part of the FFS program. [Tr. 513-14].

FFS' program is necessary for L because her family relations were too volatile to allow her to live productively and address her issues at home; that experience produced low self-esteem, a lack of

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[17] Gotthardt expanded: at this seminar, staff spend about six hours with the parents and discuss issues which brought them to FFS, the FFS program and what their involvement is going to be. [Tr. 533-34]. At the end of the day, L. And her parents met and talk through some of the things she had done which caused her placement. [Tr. 534-35].

confidence and communication. [Tr. 437, 538-39]. In turn, these emotions caused L.H. to act out in a promiscuous and self-injurious manner, directly leading to her sexual relation with a much older male and her dysfunctionality in school. [Tr. 438].

As of July 2005, L needed [and FFS provided] very substantial round the clock supervision to assure that she did not act injuriously to herself. [Tr. 66-67]. Summit failed to provide this for L and was therefore inappropriate for her. FFS did provide precisely such a setting for L and, therefore, was appropriate for her.

REASONS FOR GRANTING CERTIORARI

A. THE DECISION OF THE COURT OF APPEALS GIVES UNDUE DEFERENCE TO STATE ADMINISTRATIVE DETERMINATIONS

Through the IDEA, Congress provided for judicial review of state administrative decisions. *See*, 20 U.S.C. sec. 1415(i)(2)(c). The statute reads:

> "In any action brought under this paragraph, the court–
>
> (i) shall receive the records of the administrative proceedings;
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> (ii) shall hear additional evidence at the request of a party; and
>
> (iii) *basing its decision on the preponderance of the evidence*, shall grant such relief as the court determines is appropriate."

The statute explicitly imposes no limitations with regard to the amount in controversy. *See*, 20 U.S.C. sec. 1415(j)(3).

Nothing in this language suggests that district courts are to be rubber stamps or constrained by state administrative findings. Plainly, Congress could have crafted the IDEA to so state if that were its intent. But, the rights recognized by the IDEA are federal rights and allowing their frustration by state administrative processes which might continue to disfavor classified children was plainly not Congress' intent. Instead, the IDEA embraces a "preponderance of evidence" standard which certainly includes the entire administrative record but does not suggest that federal district courts are to be bound by conclusions reached on that record by state officers.[18]

Despite the language of this statute, the Second Circuit has routinely vacated district court decisions which, upon review, have reached conclusions different that those of state administrative officers. In nearly every such case, the Second Circuit has overruled its district courts, substantially delimiting their authority to independently review the administrative record and draw substantive conclusions by a preponderance of the evidence different from those rendered by IHOs and/or State Review Officers.

Such a high level of deference is **not** dictated by this Court's precedence and essentially relegates the district courts to little more than "rubber stamps."

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[18] It is noteworthy as pointed out by the dissent in *Rowley, infra.*, that the House of Representatives changed the language of the provision governing judicial review from "the finds of fact of the State Educational Agency shall be conclusive if supported by substantial evidence" to the current "preponderance of the evidence standard which makes no reference to any deference to the state administrative decisions.

Not only is such a narrow construction of the concept of judicial review contrary to the language of the IDEA; it is neither warranted by the expertise to which the Court of Appeals has repeatedly required deference nor rational in light of the substantial state interests which contravene the remedial purposes of the IDEA.

In *Board of Education v. Rowley*, 458 U.S. 176, 205 (1982), this Court affirmed that the IDEA contemplated "independent" judicial review of state administrative decisions *See*, 121 Cong. Rec. 37416 (1975)(remarks of Senator Williams endorsing the need for the federal district court to make a decision independent of those reached by state administrative officers). The Second Circuit has given lip service to this notion, emphasizing instead the alleged "lack of expertise" federal courts have to "second guess" decisions allegedly reached by persons with much greater expertise. *Walczak v. Florida Union Free School District*, 142 F.3d 119, 129 (2d Cir. 1998), *M.S. v. Board of Education of the Yonkers City School District*, 231 F.3d 96, 105 (2d Cir. 2000) (holding that assessment of student progress "is the type of judgment for which the district court should defer to the SRO's educational experience..."); *Sherman v. Mamaroneck Unified School District*, 340 F.3d 87, 93 (2d Cir. 2003); *Grim v. Rhinebeck Unified School District*, 346 F.3d 377, 383 (2d Cir. 2003)(reversing district court's grant of tuition reimbursement on the ground that district court "impermissibly chose between the views of conflicting experts on a controversial issue of

educational policy ... in direct contravention of the opinions of state administrative officers who had heard the same evidence.").[19]

But, this conclusion rests both upon a misconstruction of the IDEA itself, which does not constrain judicial review, and by a profound overstatement of the alleged expertise of IHOs and SROs, who, at least in New York State, are overwhelmingly attorneys whose backgrounds no more qualify them to grapple with issues of "educational policy".

It is time for this Court to interpret the IDEA as it is written and allow district court judges to play the role Congress has granted them in implementing the critical statutory purposes of the IDEA.

We acknowledge that the issue of the proper role of the district court is not new: indeed, in dissent from the Second Circuit's first embrace of the narrow standard of review we attack here, *Karl v. Board of Education*, 736 F.2d 873, 877 (2d Cir. 1984), Judge Pratt wrote, "Congress' intense concern for the welfare of each handicapped child was demonstrated by the type of judicial review it commanded. It rejected the conventional form wherein an administrator's decision must be sustained if supported by substantial evidence. *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 205-06 (1982). Instead, Congress commanded the courts to conduct de novo hearings which would consider both the

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[19] This is sheer hyperbole as the IHO is not a "state review officer," but, rather a privately employed person who appears on a list of persons designated to hear IDEA appeals. And, the SRO are state employees, attorneys, who have no known "educational expertise."

administrative record and any additional evidence offered by a party, and to reach decisions based on a preponderance of the evidence." Judge Pratt's dissent also noted that the Second Circuit's fledgling approach, which has flowered fully in cases like that *sub judice*, has effectively eliminated the substantive step of the *Rowley* analysis.

B. THE SECOND CIRCUIT'S DECISION IN THIS CASE AND OTHERS EMPLOYS A STANDARD OR REVIEW INCONSISTENT WITH THOSE EMPLOYED BY OTHER COURTS OF APPEALS

A review of the standards employed by the other Courts of Appeals leads to the conclusion that a substantial split has developed in interpreting the proper role of the district court after *Rowley*.

The First Circuit has held that the "question of the weight due the administrative findings of fact must be left to the discretion of the trial court. The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to response to the hearing officer's resolution of each material issue. **After such consideration, the court is free to accept or reject the findings in part or in whole.**" *Burlington v. Dept of Educ.*, 736 F.2d 733, 791-92 (1st Cir. 1984), aff'd 471 U.S. 359, 85 L.Ed.2d 385, 105 S.Ct. 1996 [emphasis added].

The Second Circuit has consistently followed its 1984 decision in *Karl v. Board of Education*, 736 F.2d 873, 877 (2d Cir. 1984), "We believe *Rowley* requires that federal courts defer to the final decision of the state authorities." Similar language appears in *Mrs. B. v. Milford Board of Education*, 103 F.3d 1114, 1121 (2d Cir. 1997) and *Muller v. Committee on Special Education*, 145 F.3rd 95, 101-02 (2d Cir. 1998)("*Requiring the federal courts to defer to the findings of the state administrative proceedings ensures that the federal courts do not `impose their views of preferable educational methods upon the States.*"). More recent decisions continue to emphasize the theme of deference to state decision-making, as opposed to independent judicial review applying a preponderance of the evidence standard. *See, Cerra v. Pawling*, 427 F.2d 186, 191 (2d Cir. 2005).

Again, on the contrary, the Third Circuit has made that district courts have the deference and authority to depart from state agency determinations, noting that, in such cases, they should provide some explanation for such departure. *See, Carlisle Area Sc. v. Scott P. by & through Bess P.*, 62 F.3d 520, 527 (3d Cir. 1995), *Oberti v. Board of Education*, 995 F.2d 1204, 1219 (3d Cir. 1993)(noting that district courts have discretion to determine how much deference to accord administrative findings and are free to accept or reject them).

The Fourth Circuit has imposed a requirement that when district courts do not follow state administrative findings they explain their reasoning. *Doyle v. Arlington County School Board*, 953 F.2d 100, 105 (4th Cir. 1991). *Also see, Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C.Cir. 1988) (party

challenging the administrative determination has the burden of showing why it was wrong and a court upsetting such a decision must explain its basis for doing so).

In 1993, the Fifth Circuit joined with the First, Seventh, Ninth and Eleventh Circuits and adopted the view that the district court's review of the hearing officer's decision is virtually *de novo*. *Teague Independent School District v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993), citing *Bachman v. Illinois State Board of Education*, 852 F.2d 290, 293 (7th Cir.) cert. denied, 488 U.S. 925, 109 S.Ct. 308, L.Ed.1d 327 (1988); *Gregory K. v. Longview School District*, 811 F.2d 1307, 1310-11 (9th Cir. 1987) and *Doe v. Alabama State Dep't. of Ed.*, 915 F.2d 651, 657 (11th Cir. 1990).

Since 1993, the Seventh Circuit has adopted a "sliding scale" approach, permitting greater authority to the district court where it has before it evidence not considered below, *School District of Wis. Dells v. Z.S.*, 295 F.3d 671, 675 (7th Cir. 2002), and directing its district courts to provide considerable deference absent new evidence. *Heather S. v. Wis.*, 125 F.3d 1045, 1952 (7th Cir. 1997).

On the other hand, the Eleventh Circuit has reiterated its *de novo* review standard and grants district courts the discretion to determine the level of deference to accord administrative findings. *CP v. Leon County School Board*, 483 F.3d 1151, 1153 (11th Cir. 2007).

The Circuits demonstrate profound disparity in the standard of review they have endorsed for their district courts under the IDEA. This Court must intervene and announce a standard to be used across

the United States so that all children in this country have the same rights under the statute and the determinations of state administrative decision makers are subject to a uniform standard of review, not one which depends on the happenstance of Circuit residence.

CONCLUSION

In rendering its decision below, the Court of Appeals for the Second Circuit reiterated its view that district courts lacked the authority to review de novo and apply a preponderance of the evidence standard to IDEA appeals. As this approach both contravenes the plain language of the recently re-adopted IDEA and is inconsistent with the approaches of at least five Courts of Appeal which allow district courts the discretion Congress intended to insure vindication of the rights of disabled children, this Court should accept this matter for review, reverse the decision below and establish an appropriate standard for these cases.

Respectfully submitted,

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APPENDIX

No. 07-1571-cv
M.H. and J.H. v. Monroe-Woodbury Cent. Sch. Dist.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST

INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of October, two thousand and eight.

PRESENT:

HON. GUIDO CALABRESI,
HON. CHESTER J. STRAUB,
HON. REENA RAGGI,

Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
OCT 07 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

M.H. and J.H., on their own behalf and on behalf of their daughter L.H.,

Plaintiffs-Appellees,

-v.-

MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Defendant-Appellant.

No. 07-1571-cv

For Plaintiffs-Appellees: MICHAEL H. SUSSMAN, Sussman & Watkins, Goshen, N.Y.

For Defendant-Appellant: JAMES P. DROHAN, Donoghue, Thomas, Auslander & Drohan, Hopewell Junction, N.Y.

UPON DUE CONSIDERATION of the appeal from the United States District Court for the Southern District of New York (Brieant, *J.*) **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the District Court is **REVERSED**.

This case involves the nature of a school district's obligations under the Individuals with Disabilities Education Act ("IDEA") to pay for a teenager with emotional and educational disabilities to reside at a private treatment facility. Plaintiffs-Appellees, M.H and J.H., on their own behalf and on behalf of their daughter L.H. ("Appellees" or "Parents"), initiated an IDEA action alleging that Defendant-Appellant, the Monroe-Woodbury Central School District ("Appellant" or "School District"), failed to provide their child with a free and appropriate education. They seek reimbursement for placing their daughter at the Family Foundation School, a residential private school. The School District contends that the Summit School, a private therapeutic high school where L.H. was enrolled in the day-program, was sufficient to meet its obligation under the IDEA of providing a meaningful education without being too restrictive as is prohibited by the IDEA.

Both the Impartial Hearing Officer ("IHO") and the New York State Education Department's State Review Officer ("SRO") found that the Summit

School was an appropriate placement for the child and met the requirements of the IDEA. The United States District Court for the Southern District of New York (Brieant, *J.*) reversed these administrative decisions and granted summary judgment for Parents, finding that the Summit School day-program was inadequate, and that the Family Foundation School's residential program met the requirements set by the IDEA. The School District appeals this judgment. We assume the parties' familiarity with the facts of the case, its procedural history, and the scope of the issues on appeal.

We review the District Court's award of summary judgment *de novo*. *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 191 (2d Cir. 2005). Whether the District Court correctly applied the IDEA's provisions to the facts of a particular case is a mixed question of law and fact, which we also review *de novo*. *Id.* In reviewing this case, we are aware that "IDEA's statutory scheme requires substantial deference to state administrative bodies on matters of educational policy." *Id.* (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-08 (1982)). Although we "must engage in an independent review of the administrative record and make a determination based on a preponderance of the evidence, the Supreme Court has cautioned that such review is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* at 191-92 (internal quotation marks and citation omitted). Accordingly, we give "due weight" to these administrative proceedings, "mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." *Walczak v.*

Fla. Union Free Sch. Dist., 142 F.3d 119, 129 (2d Cir. 1998) (internal quotation marks omitted). Judicial deference to the administrative proceedings "is particularly appropriate when, as here, the state hearing officers' review has been thorough and careful," *id.*, and "the district court's decision is based solely on the administrative record." *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 113 (2d Cir. 2007).

Appellant contends that the District Court erred in finding that it had to provide a residential program for the student in order to meet its obligations under the IDEA. The IDEA states that a school district must provide each child with a "free appropriate public education." 20 U.S.C. § 1412(a)(1)(A). School districts are not, however, required to give services that would enable handicapped children to maximize their potential "commensurate with the opportunity provided other children." *Rowley*, 458 U.S. at 198 (internal quotation marks and citation omitted). Instead, the IDEA requires that the educational plan be reasonably calculated to enable the child to receive "meaningful" educational benefits. *Id.* at 192. Moreover, special education and related services must be given in the "least restrictive setting consistent with a child's needs." *Walczak*, 142 F.3d at 122.

The standard for when a school district has to place a child in a residential setting was established by our Circuit in *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114 (2d Cir. 1997), which held that the state has to fund a residential program when it is necessary for the child to make "meaningful educational progress." *Id.* at 1122. Courts have held that "when the medical, social or emotional problems

that require [a residential setting] create or are intertwined with the educational problem, the states remain responsible for the costs of the residential placement." *Id.* at 1120 (internal quotation marks and citation omitted). As a result, the central inquiry is whether the student's conduct outside of the school building and outside the normal hours of the school day is such that it impedes her ability to derive an academic benefit from a day program.

To answer the question of whether the child is likely to make progress or regress under a proposed day-program, a court must examine the record for "objective evidence," such as test scores, grades, and other similar "objective" criteria. *Walczak*, 142 F.3d at 130; *see also Cerra*, 427 F.3d at 195 (cautioning that to avoid impermissibly meddling in state education methodology, a district court must examine the record for objective evidence indicating whether the student is or is likely to be progressing or regressing in the proposed educational setting). In general, the Second Circuit requires that a court point to objective evidence of a child's regression in a day-program before finding that a residential placement is required by the IDEA. *Walczak*, 142 F.3d at 131-32 (citing examples of Ninth, Third, and First Circuit cases that take the same approach).

In the instant case, the administrative record reveals that the child was progressing, not regressing, in the day-program at the Summit School. Not only do her grades reflect that she was achieving academically, but reports from certified counselors demonstrate that she was making improvements in her social and emotional problems as well. Moreover, none of several psychological

reports suggested that, in order to advance academically, the child needed a residential program to deal with her emotional problems. Though the Parents were understandably worried about the stability of their daughter's mental health, and whether relapses into past emotional difficulties would upset her education in the future, no testimony by certified experts supported their fears. We find no substantial evidence to reverse the findings of the administrative hearing officers, to which we give "due weight," *Walczak*, 142 F.3d at 129, and therefore find that the Summit School day-program provided the child with an education that met the standards set forth in the IDEA. Because we find that the Summit School is an appropriate educational placement, we need not evaluate whether the Family Foundation School would alternatively have been an appropriate placement.

We have considered all of the parties' arguments and examined the administrative record. For the foregoing reasons, the judgment of the District Court is REVERSED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Richard Alcantara
Richard Alcantara, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

M.H. and J.H. on behalf of their child, L.H.,

Plaintiffs,

- against -

MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Defendant.

06 Civ. 5105 (CLB)

Memorandum and Order

Brieant, J.

Before the Court for decision are cross motions for summary judgment. Plaintiffs initiated this action pursuant to the Individuals with Disabilities in Education Act, *20 U.S.C. §1400, et. seq.*, ("IDEA") alleging that Defendant school district failed to provide their child with a free and appropriate education, as is defined by the IDEA, and seeking reimbursement for their private school placement of the child. Defendant answered on July 27, 2006, and moved for summary judgment on November 3, 2006. (Doc. 5). Plaintiffs cross-moved for summary judgment on November 21, 2006. (Doc. 8).

Plaintiffs are the parents of L.H. L.H. and her parents reside in the Village of Monroe, New York. Defendant is Monroe Woodbury Central School District. L.H. had been classified as Learning Disabled until the relevant school year, 2005-06, when her classification was changed to Emotionally Disturbed or Disabled.

In June of 2005, L.H. was placed, pursuant to her approved IEP, in the day program at Summit School, a private school in Upper Nyack, New York. ("Summit"). Plaintiffs were unsatisfied with Summit and unilaterally placed L.H. at the Family Foundation School ("FFS"), also a private school in Hancock, New York. They claim that Defendant is responsible for the costs of educating L.H. in an appropriate placement for the 05-06 school year. They argue that Summit was not an appropriate placement, and that FSS is an appropriate placement. They seek 1) reimbursement for the costs of educating and boarding L.H. at FFS from July 2005 through the 05-06 academic year, with pre and post-judgment interest; 2) a direction that FFS be the pendent placement for L.H; and 3) an award of reasonable attorneys' fees and costs.

L.H. is presently eighteen years of age. Until the Spring 2005, she had attended public schools in the Defendant school district. Because she had been classified as Learning Disabled since she was in the fourth grade, L.H. received various forms of special education and related services through her junior year in high school, in addition to private counseling sessions. Although L.H. had been diagnosed as Learning Disabled, her overall cognitive ability has been described as normal since elementary school. (SRO decision at 1).

L.H.'s behavioral and psychological problems have long been a detriment to her academic and social development, and especially to her relationship with her family. She has been diagnosed alternatively as having Bipolar and Personality Disorders, and Oppositional Defiant Disorder. (SRO at 2). She has been described by specialists as "moody, explosive,

grandiose, defiant, silly at times, and hyperverbal," and also as a "hypomaniac and sees little or no optimism in the future especially one with independence." (Id at 2.) ("A hypomaniac presents with an agitated state, requires less sleep [than others] and is typically grandiose in her thinking.") (Tr. at 245). Her mother, in describing the ineffectiveness of counseling sessions, described L.H. as "a tough kid, just wouldn't listen, fighting with her brothers and sisters and not doing well in school, not doing her homework or getting in trouble."

In January of 2005, a series of traumatic events occurred that disrupted L.H.'s academic progress at the District High School. Around New Year's Eve, L.H. made statements indicating that she had attempted to commit suicide. In mid-January, her family found a camera that contained sexually explicit pictures of her and an unidentified male. This led to a confrontation with her father where, among other things, "she bit him several times and went into a tantrum." (Pl.'s Mem. Supp. Summ. J. 3).

On or about January 14 2005, her parents went to L.H.'s school to meet with school officials, after L.H. had told school officials that she had been physically assaulted by her father and brother the prior evening.[1] She again made statements indicating that she had contemplated suicide. The H's brought L.H. to Arden Hill Hospital, and she was subsequently transferred to Four Winds Hospital, a private psychiatric hospital in Westchester County. While at Four Winds, L.H.'s "boyfriend", a much

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[1] H.'s claim that they were cleared of any abuse charges. Neither party appears to claim that L.H. is or was abused at home.

older man who was a Lieutenant with the New York City Police Department, committed suicide. (L.H.'s father apparently learned of this relationship when he found the camera, and had reported this individual to law enforcement officials a few days earlier.)

L.H. was discharged from Four Winds on February 23, 2005. Upon her discharge from Four Winds, the hospital issued the following Clinical recommendation:

> "To continue to build on the gains [L.H.] has made in this program it is important that she is able to continue in a supportive program that offers a low student-teacher ratio, a highly structured environment and therapeutic support. It is recommended that [L.H.] attend Intensive Day Treatment (IDT) until she can be referred to a long term supportive program and be provided with home bound instruction to cover any gaps in scheduling."

After her release from Four Winds, a Committee on Special Education ("CSE") meeting was held to determine an appropriate educational program for L.H. The CSE included: L.H.'s parents and their attorney; her therapist from Four Winds; two school psychologists; the CSE chairperson; the District's assistant director of Pupil Personnel Services; a regular and special education teacher; and an assistant high school principal. At that time, neither the parents nor the District believed that the District high school was an appropriate placement for L.H. At the second meeting of the CSE, the CSE

recommended that the parents choose a placement for L.H. among four high school day programs that the CSE had selected.

Out of those four, the H's eventually chose Summit, a private school in Nyack, NY. There are presently 35 day students and 115 residential students at the school. Summit offers a regents level academic program for students with emotional adjustment difficulties from grades 9-12. Summit serves students with classifications such as Emotionally Disturbed, Learning Disabled, Asperger's Syndrome, Tourette's Syndrome, Attention Deficit Disorder. L.H. attended Summit for the remainder of the 2004-5 school year as a day student, paid for by the school district.

When L.H. first arrived at Summit, she cut class, was disruptive, and described her sexual experiences to other students, contrary to the Principal's instructions. School administrators reported however that, after four or five weeks, she began to adjust to and benefit from the program. She began attending classes regularly, and her attitude and demeanor improved. In June of 2005, L.H. voluntarily attended Summit's graduation ceremony. Her final grades for the year at Summit were: C in English, A in Mathematics, A+ in Science, and B in Social Studies.

In July, 2005, after L.H. completed the regular 2004-05 school year at Summit, the H's enrolled L.H. in FFS, a private boarding school in Hancock, NY. FFS follows a "twelve step" program approach, and offers family-style living arrangements. The school divides its students into eight "families" with a mother and father figure assigned to each. Each "family" has also one counselor and one student

counselor assigned to it. Each student, including L.H., resides in a dorm with about 30 other students. About 15 staff are assigned to each house. The houses are divided evenly between boys and girls.

On July 14, 2005, the H's requested an impartial hearing arguing that in part due to the traumatic events she had experienced, FFS was appropriate because L.H. needed a more structured, residential setting where she could complete her high school studies. Defendant argued that Summit was an appropriate placement and that FFS was "overly restrictive."

After three days of hearings, the Impartial Hearing Officer (IHO) denied reimbursement, finding that "the parents have not met their burden of proof that the CSE recommended a program and placement in the form of a day treatment program at Summit that was not appropriate and not reasonably calculated to provide educational benefits to the student." The IHO also found, however, that FFS was an appropriate placement, and that equitable considerations weighed in favor of the parents. (IHO at 8).

The New York State Office of State Review (SRO) affirmed the IHO, holding that the District had provided a free appropriate education to L.H. under the IDEA. The SRO held that "the record shows that the student displayed difficult behavior principally at home. The record also shows that despite the student's behavior at home, she made appropriate academic and social progress while attending Summit's day program." (SRO at 9). Because he

found that the Summit placement was appropriate, he did not address the appropriateness of FFS. This appeal followed.

Defendant moves for summary judgment, arguing that both the IHO and SRO were correct in finding that Summit was an appropriate placement. Defendants argue that:

> "L.H.'s attendance, behavior, and grades were all under control during the eight weeks she was at Summit. The record reflects L.H. was accessing her individual counseling, and not engaging in any self-destructive, suicidal, or promiscuous behaviors while at Summit."

Defendant argues that any incidents of destructive behavior "arose from incidents at home, rather than at school." Defendant also argues that the parents have failed to sustain their burden of showing that FFS is an appropriate placement. Defendants claim that: "FFS is not appropriate in this case because it does not provide the professional therapy and clinical counseling needed, and also because the academic program was not reasonably calculated to make meaningful progress in the least restrictive environment."

The Parents cross-move for summary judgment. They argue that Defendants espouse an outdated "minimalist position", that interprets the IDEA standard as "a basic floor of opportunity," and that this conception of the IDEA has been altered by recent amendments to that statute. The Parents also contend that Summit was not an appropriate placement because it "ignored central aspects of L.H.'s disability, her high level of emotional distress and her retarding relationship with her parents,

her inappropriate and out of control, promiscuous relationship with the world," and "[i]n contrast, FFS focused on the development of the whole person and provided a 24/7 structure necessary if L.H. is to transcend her injurious and socially irresponsible conduct and access her capacity as a learner."

Discussion

States that receive funding under IDEA must provide "a free appropriate public education" to each student with a disability. *20 U.S.C. sec. 1400 (d)(1)(A)*. "When a state receiving IDEA funding fails to give a disabled child such an education, the child's parent may remove the child to an appropriate private school and then seek retroactive tuition reimbursement from the state." *M.S. v. Yonkers Bd. of Educ., 231 F.3d 96, 102, citing School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70, (1985).

Initial determinations of the appropriateness of the IEP are made by the IHO and SRO, which "are then subject to 'independent' judicial review." *Walczak v. Florida Union Free School Dist.* 142 F.3d 119, *129 (2d Cir. 1998) quoting Board of Educ. v. Rowley*, 458 U.S. 176, 205 (1982). The Court "must examine the record for any 'objective evidence' indicating whether the child is likely to make progress or regress under the proposed plan." *Walczak at* 130. "While federal courts do not simply rubber stamp administrative decisions, they are expected to give 'due weight' to these proceedings, mindful that the judiciary generally 'lack[s] the 'specialized knowledge and experience' necessary

to resolve 'persistent and difficult questions of educational policy.'" *Id at 129 (quoting Rowley at 206, 208).*

The inquiry for this Court in assessing a claim for reimbursement by parents for their unilateral placement of their child is 1) "was the IEP proposed by the school district inappropriate"; 2) "was the private placement appropriate to the child's needs"; and 3) do "equitable considerations" support the parents claim for reimbursement. *Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356, 363 (2d Cir. 2006). The Court will examine each of these considerations in turn.

In determining whether the IEP proposed by the district was appropriate, the Court must determine "(1) whether the state complied with the procedural requirements of IDEA, and (2) whether the challenged IEP was 'reasonably calculated to enable the child to receive educational benefits.'" *Walczak v. Florida Union Free School Dist.* 142 F.3d 119, 129 (2d Cir. 1998) *quoting Board of Educ. v. Rowley*, 458 U.S. at 206-07. Plaintiffs do not appear to dispute that Defendant met the procedural requirements of the IDEA. Therefore, the Court moves to the substantive appropriateness of the District's proposed IEP.

This Court concludes that the SRO erred as matter of law in finding that Summit was an appropriate placement for L.H. during the 2005-06 school year, because the IEP did not address the very concerns that led to L.H.'s hospitalization and withdrawal from the District High School.

All parties agree that L.H. could not continue at the District High School. The parties also agree that it was not her lack of academic progress within the District High School curriculum that made the High School inappropriate. The 2004-05 IEP frankly stated that "[p]rior to the emotionally charged event, the student was meeting with success" her special education program, and was "on track to fulfill requirements for graduation."

When L.H. arrived at Summit, after initial difficulties, she began to display the same academic competence that she had in the District High School. The District and the SRO both cite this fact in support of their argument that Summit was an appropriate placement. However, if academic competency was enough, than the District High School would have continued to be an appropriate placement. The H's found the District's IEP lacking because, every day after 3:00 P.M., Summit provided no support in the H's struggle to change L.H.'s "inappropriate and out of control, promiscuous relationship with the world." The District High School was inadequate for the same reason.

Defendant did not agree to remove L.H. from the District High School to a private school (Summit) because of her academic performance, but because of her destructive behavior and traumatic consequences that resulted *after school hours*. The social worker at Four Winds described L.H.'s life outside of the classroom as being characterized by a history of self mutilation, suicide attempts, sexual promiscuity, and a home life that was "incredibly chaotic." (Joint Exhibit 19).

Although Summit may have provided enhanced special education services and, to a limited extent, therapeutic support, the H's saw that it could not prevent the same destructive behavior that manifested itself in January of 2005. They sought to act before a foreseeable tragedy showed that L.H.'s placement was inappropriate. Our Court of Appeals has held that "The fact that a residential placement may be required to alter a child's regressive behavior at home as well as within the classroom, or is required due primarily to emotional problems, does not relieve the state of its obligation to pay for the program under federal law so long as it is necessary to insure that the child can be properly educated." *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1122 (2d Cir. 1997). Plaintiffs have met their burden to show that the District's IEP was not appropriate, because it failed to deal with the very issues that led to L.H.'s severe regression in January 2005.

In order to award reimbursement under the IEP, the Court must also determine "that the private education services obtained by the parents were appropriate to the child's needs." *Walc zak at 129.* "The test for the parents' private placement is that it is appropriate, and not that it is perfect." *Warren G. V. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999) (quoted by M.S. v. City of Yonkers at 104).*

The Court concludes, as the IHO also found, that the parents have carried their burden of showing that FFS was an appropriate placement for L.H. FFS provided L.H. with the complete structure that both the District High School and Summit lacked. The parents have demonstrated that FFS, unlike Summit, provided the structured support that L.H.

needed to prevent the regression that occurred in January of 2005. L.H.'s counselor at FFS stated that "[i]t's important that L. in particular knows and learns how to relate with her parents and her siblings so when she goes home she is not at risk for relapse." (Tr. 514). She has been watched closely, and as her FFS counselor testified, "[s]he is learning to live with other people and she is learning how to relate to other people. She is learning how communicate effectively. She is learning how to have friends, real friends, ones that she is not seeking materialistic things from." (Tr. 516).

The Court also concludes, as did the IHO, that the equities favor the Plaintiffs in this case. "[B]ecause the authority to grant reimbursement is discretionary, 'equitable considerations [relating to the reasonableness of the action taken by the parents] are relevant in fashioning relief.'" *Frank G. at* 363-364 (*quoting Burlington at* 374.) As the IHO stated in the proceedings below, the record is replete "with references to the tragic events which have interspersed themselves within the student's life and that of her family members", and of the parents' "desperation" and "frustration". The IHO found this to be evident in their "demeanor and conduct throughout the hearing", and this Court concludes that it is also evident from the cold record. This Court finds that Plaintiffs acted reasonably in seeking an appropriate placement for the child that would give her the best chance of not regressing dramatically.

Conclusion

For the foregoing reasons, Plaintiffs' motion for summary judgment is granted, (Doc. 8) and Defendant's motion is denied. (Doc. 5). The parties shall attempt to agree on a proposed form of judgment, or settle a judgment on ten (10) days notice if unable to agree. Plaintiffs' counsel shall submit his lodestar with the proposed judgment.

SO ORDERED.

Dated: White Plains, New York
March 13, 2007

/s/ Charles Brieant
Charles Brieant, U.S.D.J.

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Supreme Court, U.S.
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No. 08-841

In The

Supreme Court of the United States

OCTOBER TERM 2008

M.H. and J.H. on behalf of their child, L.H.,

Petitioners,

-against-

MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review the determination of the Second Circuit that due weight should be accorded to the decision of administrative hearing officers when federal courts review a claim for tuition reimbursement under the Individuals With Disabilities Education Act.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 6

1. The conflict asserted to exist among the Circuits will not present itself for review on the record before the Court 6

   a. Petitioner is, in fact, in disagreement with Rowley's "due weight" requirement, and not any independent holding of the Second Circuit. 7

   b. No rational construction of the Second Circuit's holding would require district courts to "rubber stamp" administrative findings under IDEA. 8

2. Since the District Court failed to accord any weight whatsoever to the administrative decision makers, the District Court decision would not have withstood appellate scrutiny, under any definition of due weight. 11

CONCLUSION 15

TABLE OF AUTHORITIES

CASES:

Adams v. Oregon,
195 F.3d 1141 (9th Cir., 1999) 12

Burilovich v. Board of Ed,
208 F.3d 560 (6th Cir., 2000) 12

D.F. ex rel N.C. v. Ramapo Central School District,
430 F. 3d 595 (2d Cir. 2005) 10

Dale M. ex rel Alice M. v. Board of Education of Bradley-Bourbounnais High School District No. 307,
237 F.3d 813 (7th Cir. 2001) 13

Doyle v. Arlington County School Board,
953 F.2d 100 (4th Cir. 1997) 11

Forest Grove School Dist. v. T.A,
2009 WL 104297 (U.S.) 2

Fort Zumwalt School District v. Clynes,
119 F.3d 607; cert. den. 523 U.S. 1137
(8th Cir. 1998) 12

Frank G. v. Hyde Park School District,
459 F. 3d 356,367 (2d. Cir. 2006) 10, 13

Gilbert v. Homar,
52 U.S. 924, (1997) 14

Lenn v. Portland S.D.,
998 F.2d 1086 (1st Cir. 1993) 11

Lillbask ex rel Mauclaire v. State of Conn.
397 F.3d 77 (2d Cir. 2005) 10

Mrs. B. v. Milford
103 F.3d 114 (2d Cir. 1997) 10

Muller o/b/o Muller v. Committee on Special Education
145 F. 3d 95 (2d Cir. 1998) 10

Rowley v. Hendrick Hudson Central School District,
458 U.S. 176, 206 (1982) ..... 4, ... Passim

School Committee of Burlington v. Department of Education,
451 U.S. 359 (1985). 2

Teague v. Independent School Dist.,
999 F.2d 127, 131 (5th Cir. 1993) 11

OTHER AUTHORITY:

STATUTES

§ 1412(a)(10)(c) of IDEA 2

20 U.S.C. 1415(e)(2) 3

INTRODUCTION

Respondent Board of Education of the Monroe-Woodbury Central School District ("Board" or "Respondent") requests that this Court deny the petition for a writ of certiorari from the decision of the United States Court of Appeals for the Second Circuit. The citation for the decision below is M.H. and J.H., on their own behalf and on behalf of their daughter L.H. v. Monroe-Woodbury Central School District, _F.3d_2008 W.L. 4507592 (2d Cir. 2008).

STATEMENT OF THE CASE

Procedural History

1. Administrative Hearings – Petitioner had instituted an impartial hearing under the Individuals With Disabilities Education Act ("IDEA") seeking reimbursement from respondent for the cost of tuition for their daughter at a private school under the test set forth in this Court's decision in School Committee of Burlington v. Department of Education, 451 U.S. 359, 369-370 (1985).[1]

New York State has a two-tiered system for administrative prosecution of due process complaints under the Individuals with Disabilities Education Act. At the first tier, the impartial hearing officer ("IHO"), denied tuition reimbursement to the parent on the grounds that the Board was providing L.H. with an appropriate education, at an approved private day school. In dicta, the IHO went on to state that he felt the parent's preferred program, though it had problems, was also an appropriate placement. No tuition reimbursement was awarded to the parent, however, as the school district's placement was found to be appropriate.

On appeal, the New York State Education Department's State Review Officer ("SRO") also found

---

[1] As L.H. had, for many years, received special education and related services from the school district prior to the demand for tuition reimbursement, this case does not present for review the issue this Court recently agreed to hear in Forest Grove School Dist. v. T.A. 2009 WL 104297 i.e., whether § 1412(a)(10)(c) of the IDEA creates a categorical bar to tuition reimbursement for students who have not previously received special education and related services from a public school district.

that the Board's individualized education plan ("IEP") was appropriate, and that tuition reimbursement was, accordingly, not warranted. The SRO found specifically that:

- consistent with the recommendations of the student's treating professionals, the Summit School (i.e., the school district's recommended placement) offered a structured, therapeutic environment, and classes with a low student to teacher ratio;

- after a brief adjustment period, the student had begun to follow the rules and attend class at Summit; was neither expressing suicidal thoughts nor engaging in self-abusive behavior while at that placement; and was also succeeding academically there;

- the student did not require a residential placement in order to receive a free, appropriate public education during the 2005-2006 school year.

2. District Court – Upon the parent's appeal to the District Court [pursuant to 20 U.S.C. 1415(e)(2)] the case was decided upon a motion (and cross-motion) for summary judgment. Neither party requested a hearing from the District Court, and no additional evidence was received by the district court, so that Court made its determination on the same record which had been before the administrative decision makers.

Although it had neither conducted any hearing, nor received any additional evidence, the District Court rejected both SRO and IHO's finding that the District's IEP was appropriate. It also found the private, unilateral residential placement made by the family to be appropriate, again, based upon the same record

before the SRO. The District Court acknowledged that there had been no procedural violations of IDEA by the school district; accordingly, the only issue remaining was whether the District's IEP was reasonably calculated to provide meaningful educational benefit to the student, under the test enunciated in this Court's decision in Rowley v. Hendrick Hudson Central School District, 458 U.S.176 (1982). The District Court also rejected respondent's argument (which had been adopted by the SRO) that the student's undisputed academic progress at Summit demonstrated that placement was appropriate, stating that: "...if academic competency was enough, then the District High School would have continued to be an appropriate placement." Petition for Writ of Certiorari, at page A-18.

The District Court did, however, agree that the student had been progressing appropriately at the Summit School, with regard to her academics: "...(W)hen L.H. arrived at Summit, after initial difficulties, she began to display the same academic competence that she had in the District High School." Id.

3. The Second Circuit's Decision - Upon appeal by the Board, the Second Circuit reversed the District Court's award of tuition reimbursement. In its decision, the Second Circuit reviewed the language of this Court's decision in Rowley, as well as its own decisions, which point out that: "...IDEA's statutory scheme requires substantial deference to state administrative bodies on matters of educational policy." Rowley, at 458 U.S. 176, 205-208 (1982). That Second Circuit also pointed out that courts reviewing administrative decisions under IDEA:

> ...must engage in an independent review of the administrative record and make a determination based on a preponderance of the evidence, the Supreme Court has cautioned that such review is by no means an invitation to the Courts to substitute their own notions of sound educational policy to those of the school authorities which they review.

Id.

According "due weight" to the SRO's decision, the Circuit Court declined to disturb the administrative finding as to the IEP's appropriateness. The Court pointed out that the record did reflect the student was making academic progress in respondent's placement; that she was making improvements in her social and emotional problems in that placement, and that none of the reports suggested that, in order to advance academically, the student needed a residential program to deal with her emotional problems. Petition for Writ of Certiorari, at A-6 and A-7.

The Second Circuit found, therefore, found the parent was not entitled to tuition reimbursement under IDEA.

In so ruling, the Second Circuit specifically found no substantial evidence existed to reverse the IHO or SRO on the issue of the appropriateness of the District's placement.

Petitioner did not seek rehearing of the Second Circuit's decision, and now seeks a grant of certiorari from this Court.

REASONS FOR DENYING THE PETITION

It is respectfully submitted that the Petition should be denied, since:

1) The conflict asserted to exist among the Circuits (as to what constitutes "due weight" for the purpose of judicial review of an impartial hearing under IDEA) will not present itself for review on this record, and:

2) Since the District Court failed to accord any weight whatsoever to the administrative decision makers, the District Court decision would not have withstood appellate scrutiny under any definition of due weight.

1) The conflict asserted to exist among the Circuits will not present itself for review on the record before the Court

Petitioner argues certiorari should issue since the Second Circuit's decision accords "undue deference" to state administrative decisions, and employs a standard at odds with that employed in other Circuits. Pet. for Writ of Cert., at pp. "18" – "25".

Even if that were a question this Court was otherwise disposed to address, this case simply does not present that issue for review on the record presented, as discussed below.

(a) Petitioner, in fact, is in disagreement with Rowley's "due weight" requirement, and not any independent holding of the Second Circuit.

The Second Circuit's decision specifically acknowledges Rowley's teaching that courts must engage in an independent review of the administrative record and make a determination based on a preponderance of the evidence. Petition for Writ of Certiorari, at A-4.

The Second Circuit's decision also acknowledges (again, quoting Rowley) that this Court has also cautioned that a district court's review "...is by no means an invitation to the Courts to substitute their own notions of sound educational policy for those of the school authorities which they review" (Pet. for Writ of Certiorari, at A-4), and that courts are constrained to accord "due weight" to administrative proceedings, as the judiciary "...generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy" Id.

Petitioner clearly disagrees with this principle i.e., that due weight must be accorded to administrative decision makers, because of the judiciary's more limited expertise in dealing with matters of educational policy.[2] Petitioner's dissatisfaction, however, does not lie with any independent pronouncement by the Second Circuit, but, reflects instead a disagreement with this Court's

[2] See, also., Petition for Writ of Certiorari, at A-20 – "The Second Circuit has given lip service to this notion emphasizing instead the alleged 'lack of expertise' federal courts have to 'second guess' decisions allegedly reached by persons with much greater expertise."

own holding in Rowley. The Petition for Certiorari, in fact, notably avoids any mention of Rowley's holding that:

> ...the provision that a reviewing court base its decision on the preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for there at the school authorities which they review... the fact that § 1415(e) requires that the reviewing court 'receive the records at the (state) administrative proceedings' carries with it the implied requirement that due weight shall be given to those proceedings.

Rowlezy, at 458 U.S. 176.206.

It is, therefore, Rowley's due weight requirement, and not any teaching of the Second Circuit, with which petitioner disagrees; accordingly, certiorari should not be granted.

(b) No rational construction of the Second Circuit's holding would require district courts to "rubber stamp" administrative findings under IDEA -

No rational reading of the Second Circuit's decision warrants the conclusion that district courts must either "rubber stamp" administrative decisions or are precluded from applying a preponderance of evidence standard to IDEA appeals.

Neither directly nor by implication, does the Second Circuit's decision hold that an administrative hearing officer's findings under IDEA are conclusive on a district court. The Circuit Court's decision here can

in no way be read to require blind obeisance to administrative rulings, and instead, is grounded upon that Court's independent conclusion that the administrative decision maker's findings were amply supported by the record.

Analysis of the decision below indicates it was predicated upon a fact-based review of the administrative record, in which the Court examined whether the SRO's finding regarding the appropriateness of the District's placement was sufficiently supported by that record and, therefore, entitled to deference. While Petitioner obviously disagrees with the Circuit Court's decision that the SRO's finding was supported by the record, that disagreement provides no basis for this Court's intervention.

The decision is, therefore, squarely in line with settled law that, under this Court's decision in Rowley, that "due weight" should be accorded to administrative decision makers.[3]

Other Decisions by the Second Circuit Reflect That it Does Not Require Complete Deference to Administrative Decision Makers under IDEA.

While the Petition suggests that "...in nearly every such case, the Second Circuit has affirmed hearing officer decisions in IDEA cases," that characterization, it is respectfully submitted, is demonstrably incorrect.

---

[3] Petitioner's argument that "...it is time for this Court to interpret the IDEA as it is written" suggests that it is Petitioner's position that Rowley rewrites IDEA by according "due weight" to administrative hearing officers.

For example, in Frank G. v. Hyde Park School District 459 F. 3d 356, 367 (2d. Cir. 2006), cert. den. ___U.S.___, 128 S.Ct. 436 (2007) the Second Circuit recently affirmed a District Court's reversal of the state administrative decision maker, pointing out the District Court:

> ...correctly applied the rule that, when reviewing administrative decisions, federal courts must base their decisions on 'the preponderance of the evidence' taking into account the evidence in the administrative record and any further evidence presented before the District Court by the parties.

Other instances where the Second Circuit has upheld District Court reversals of impartial hearing officers include D.F. ex rel N.C. v. Ramapo Central School District 430 F. 3d 595 (2d Cir. 2005); Lillbask ex rel Mauclaire v. State of Conn. 397 F.3d 77 (2d Cir. 2005); Mrs. B. v. Milford, 103 F.3d 114 (2d Cir. 1997), and Muller o/b/o Muller v. Committee on Special Education 145 F. 3d 95 (2d Cir. 1998).

As the Second Circuit has reversed hearing officers on issues ranging from educational progress (Frank G.), to the appropriate standard for review of an individualized education plan (D.F.), to the issue of classification under IDEA (Muller), it simply cannot be credibly argued that the Second Circuit requires district courts to "rubber stamp" administrative decisions, and the Petition for Writ of Certiorari should be denied.

Accordingly, the issue for which review is sought is not raised by the decision below.

2) **Since the District Court failed to accord any weight whatsoever to the administrative decision makers, the District Court decision would not have withstood appellate scrutiny under any definition of "due weight"**

Another reason ~~why it is~~ submitted that the Petition presents no reviewable issue on the "due weight" standard is that the District Court here accorded no weight whatsoever to the SRO's decision on the appropriateness of the school district program. The District Court in this case simply substituted its own subjective judgment for that of the IHO and SRO on the issue of appropriateness of the district's program, despite the fact it neither conducted its own hearing nor received additional evidence. It neither analyzed the district's individualized educational plan nor came to grips with the SRO's resolution of each material issue. It is respectfully submitted the District Court accorded no weight to the administrative hearing officers, and its decision would not have withstood scrutiny under any formulation of "due weight."

All circuits appear to interpret Rowley's "due weight" requirement as mandating that some deference be accorded the administrative decision maker. See e.g., Teague v. Independent School Dist., 999 F.2d 127, 131 (5th Cir. 1993) [...the district court should give the hearing officer's findings 'due weight,' even though hearing officer's findings are not conclusive]; Lenn v. Portland S.D., 998 F.2d 1083 (1st Cir. 1993) [IDEA requires a more critical appraisal of the agency determination than clear-error review entails, but it nevertheless falls well short of complete de novo review]; Doyle v. Arlington County School Board, 953

F.2d 100 (4th Cir. 1997) [hearing officer's findings of fact are considered prima facie correct; court must explain reasons if not following findings]; Burilovich v. Board of Ed, 208 F.3d 560, 566 (6th Cir., 2000) [weight accorded due administrative decisions will vary, depending on whether the Court is reviewing procedural matters and whether educational expertise is essential to the administrative findings]; Dale M., supra at 237 F.3d 813 (7th Cir. 2001) [when district court bases its decision on review of the record, he must accord "due deference" to record; mere disagreement with administrative decision insufficient; court must be "strongly convinced" order is erroneous]; Fort Zumwalt School District v. Clynes, 119 F.3d 607, 610, cert. den. 523 U.S. 1137 (8th Cir. 1998) [level of deference to administrative decision less than required under substantial evidence test, but consideration should be given to state hearing panel's opportunity to observe demeanor of witnesses]; Adams v. Oregon, 195 F.3d 1141, 1145 (9th Cir., 1999) [increased deference should be accorded hearing officer where findings are thorough and complete].

As this review demonstrates, while the language of the various circuits on decisions addressing "due weight" may not be identical, the common threads running through these decisions are that:

- the District Court's review of the administrative record is something less than de novo;

- some deference must be accorded the administrative decision maker, which deference may vary according to the attendant circumstances, including whether the District Court heard additional testimony, and whether the administrative decision

was thorough and closely reasoned.

The Second Circuit's related observation that the deference accorded to administrative decision makers is greater where the district court itself did not itself conduct a hearing is also entirely in line with the decisions of other circuits on this issue. See e.g., Dale M. ex rel Alice M. v. Board of Education of Bradley-Bourbounnais High School District No. 307, 237 F.3d 813, (7th Cir. 2001) ["...(w)hen the court has before it evidence that was not before the hearing officers, the amount of deference due the reviewing officer declines, since the latter's decision was based on an incomplete record. But when there either is no new evidence or the judge for some reason does not consider it, he owes considerable deference to the reviewing officer"].

The Second Circuit has, similarly, upheld a district court's reversal of administrative hearing officers where the district Court held its own hearing and received additional evidence. Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 367, cert. den. U.S., 128 S. Ct. 436 (2007)

Therefore, while petitioner may argue that the outcome of an IDEA appeal will likely depend upon the circuit or court in which it was filed, it is respectfully submitted the outcome of this particular case would not vary, since this District Court accorded no deference whatsoever to the administrative findings, which is inconsistent with any interpretation of Rowley's "due weight" requirement. This Court, therefore, need not reach the issue of the purported "split" among the Circuits on this record.

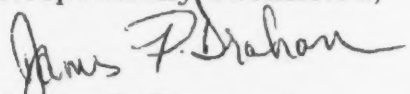
To the extent petitioner now (under this

argument) seeks a uniform definition of "due weight" from this Court which can be inflexibly applied to every IDEA review by a court (regardless of the attendant circumstances), we respectfully submit that invitation should be declined by the Court. "Due weight" (much like "due" process) is, by definition, a concept not susceptible of rigid and formulaic application. See e.g., Gilbert v. Homar, 520 U.S. 924, (1997) ["...(d)ue process is flexible and calls for such procedural protections as the particular situation demands."] As "due weight" will similarly and necessarily vary with each particular situation, it is respectfully submitted that codification of that standard is neither necessary nor appropriate.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,



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